



Annual Report

July 1999 to June 2000



101-01864/

ALBERTA LAW REFORM INSTITUTE

EDMONTON ALBERTA

ANNUAL REPORT

July 1999 to June 2000

ISSN 0229-6276
ISBN 1-896078-44-3

The Institute's office is located at:

402 Law Centre
University of Alberta
Edmonton AB
CANADA T6G 2H5

Telephone: (780) 492-5291

Fax: (780) 492-1790

Internet Address: reform@alri.ualberta.ca

Website: <http://www.law.ualberta.ca/alri>



The Institute of Law Research and Reform was established in 1968 by the Attorney General of Alberta, the Governors of the University of Alberta and the Law Society of Alberta. The new name "**Alberta Law Reform Institute**" was adopted in 1989.

Funding for the Institute comes primarily from the Department of Justice and the Alberta Law Foundation. The University provides the Institute with office premises and many additional services, including a cash grant.

The objectives of the Institute set out in the Founding Agreement are as follows:

RESEARCH

To conduct and direct research into law and the administration of justice.

RECOMMEND

To consider matters of law reform with a view to proposing to the appropriate authority the means by which the law may be made more useful and effective.

PROMOTE

To promote law research and reform.

COOPERATE

For the purposes described above, to work in cooperation with the Faculty of Law of the University of Alberta, the Faculty of Law of the University of Calgary, and with others.



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Christina Gauk
Janice Henderson-Lypkie
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Margaret A. Shone
Vivian Stevenson

Administrator:

Carol Fowlie

Support Staff:

Marlene Welton
Dina Henderson
Jenny Koziar

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ACKNOWLEDGMENTS



An effective law reform agency needs both institutional and personal links if it is to continue to respond to the challenge of improving the law and the administration of justice in Alberta.

On an institutional level, we acknowledge the continued support of our founding parties, the Province of Alberta, the Law Society of Alberta, and the University of Alberta.

Our relationship with the Department of Justice is cordial and productive. It represents our mutual interest in improving the law and administration of justice with mutual respect for the roles played by the Department and an independent law reform agency. Both the Minister, the Honourable Dave Hancock, Q.C., and the Deputy, Mr. Paul Bourque, Q.C., have been open, approachable, and helpful. We confidently look forward to that relationship continuing and flourishing.

We also acknowledge the fact that the Law Society has taken steps to provide access to the profession, and to ensure that the profession is made continually aware of Institute activities. The Director of the Institute is able to attend Benchers' convocations and is made aware of the activities of the various sub-committees. We would like to acknowledge the work of the Law Society's Secretary, Mr. Peter Freeman, Q.C., and the Presidents of the Law Society, first Mr. Clackson, Q.C., now Mr. Justice Clackson, and subsequently, Mr. Alan Macleod, Q.C., whom we are fortunate to have as a Board member.

We also have access to the broader legal community through the Canadian Bar Association, Alberta Branch, and through the Legal Education Society of Alberta. The Bar Association allows us access to the Council for important reporting purposes, and to the various sections. We continue to view the sections as a vital part of our feedback from the broader legal community on the proposals under consideration. Through the auspices of the Legal Education Society of Alberta, many of our proposals are integrated into continuing legal education

sessions, allowing the Institute to play a valuable part in the implementation process.

In particular, it is important to acknowledge the financial support of the Institute. The University provides our home, administrative support services, and an annual grant. Approximately 40% of our funding is received through the Department of Justice, and the balance from the Alberta Law Foundation, whose three-year funding estimates have been a boon to our planning process. To the Chair of the Foundation Board, Mr. Anthony Friend, Q.C., and to its Executive Secretary, Mr. Owen Snider, we express the Institute's gratitude for their ongoing support and financial assistance.

Finally, I wish to acknowledge all of those individuals who have made specific contributions to our projects by way of response to consultations or service on committees. We rely heavily on these volunteer efforts to assist Counsel with the research and policy development. The resulting recommendations are a reflection of the quality of this volunteer effort. Nowhere is this effort more obvious than in the contributions of our Board who are called on many times to assist outside the regular activities of Board meetings and Project Committee membership. Our acknowledgement is a recognition of the load which Board members bear and the contribution they make to the Institute as a whole.



In last year's Annual Report, I highlighted two features. The first feature related to the completion of a five-year period of reduced and somewhat uncertain funding. In the year under review, government and university funding has remained stable, and the Law Foundation has increased its funding slightly with indications of possible further increases. These funding levels do not remove, but at least alleviate, some of the pressures associated with the deficit budget financing which the Institute has undergone for the last few years. It has also been of considerable help to receive some indication of future funding, and the three-year projections used by the Law Foundation have been particularly helpful in budgeting decisions.

Last year I also pointed out some significant changes in the legislative process, and in particular the creation of Standing Policy Committees and the implementation of three-year business and legislative plans. These changes create windows of action and opportunity.

The second feature of our last report was the implementation of an organizational review, which we said was timely in the light of the legislative process changes. We asked questions about how the Institute sets its agenda and chooses its projects. We asked questions about our process and whether our response was timely and appropriate.

The organizational process has now progressed to the point of pilot projects to examine suggested changes in procedure. After completion of the initial round of consultations and interviews, the Board concentrated on three topics. These were: (1) the process of choosing reform projects; (2) the pace and production of reports; and (3) the cycle time for projects generally.

The Board's overall goal for the operational changes were to: (1) reduce overall project length; (2) create predictable and reliable completion dates; and (3)

synchronize the time of completion with the time of implementation or use by others.

So far the creation of a clear feasibility stage prior to formal approval has been helpful. The Board is enabled to make an informed decision on project priority, having access to issues and preliminary responses, indications of need for reform, the potential involvement of various groups, and a project plan which sets out both the methodology and the anticipated time lines.

As our experience develops, and particularly after a review of the first pilot projects, our project planning expertise should become more clear and more reliable.

One element of the overall process remains of concern. We have previously discussed the use of a new document, the Consultation Memorandum, which is sent to a smaller more targeted audience than was the case with our Reports for Discussion. The objective was to obtain greater feedback in a shorter time from an audience that was already reasonably familiar with the issues. We have now used the Consultation Memorandum in nine areas with relatively good success. However, there is still the risk that despite distributing the Consultation Memorandum to appropriate sources, and even taking specific steps to bring the memorandum to the attention of interested parties, the response might still be small. There is then a risk that those who should have responded earlier will in fact respond at a very late date. This factor may further complicate an already complex implementation process, and certainly cause some adjustment of the time lines that have been set. We have posed the question of what must the Institute do to engage the attention of those who have or ought to have views on the topic under consideration? How can those views be elicited at a time when they can have most influence on the development of policy? So far no magic solution has appeared, and this will remain a challenge to be addressed in the project planning process.

During the year the Institute also faced a number of staff changes which will have an impact on the productivity of the Institute while hiring decisions are made. Ms. Gauk left the Institute on March 31, and Ms. Stevenson at the end of

April. In addition the Board accepted the tendered resignation of Mr. Bowes to be effective at a later date in the year.

Despite process changes and staff turnover, the Institute published three Consultation Memoranda, five Final Reports, and co-published with the Law Society of Alberta an important work on Self-Regulation of the Legal Profession, authored by our Director Emeritus, Dr. W.H. Hurlburt, Q.C.

The 2000/2001 year will be a challenging time. New counsel will be employed, a number of new projects are to be taken up and our pilot processes will require further refining. However, we will face those challenges with indications of secure funding, and the confident support of our founding parties.

Summer Students

Each summer we retain several students to assist with project research. This gives the students some experience in the type of research and writing we do, and assists counsel with some of the overall workload. Our students are of consistently high calibre and make a real contribution to our activities.

Summer 1999

Debra Curcio
Denise Espeut
Glenn Taylor

Summer 2000

Bonnie Bokenfohr
Jon Stolee





Program

The Institute's program is the delivery of law reform proposals. It does so by specific projects.

Project Selection Criteria

The rationale for the program content includes a number of component principles:

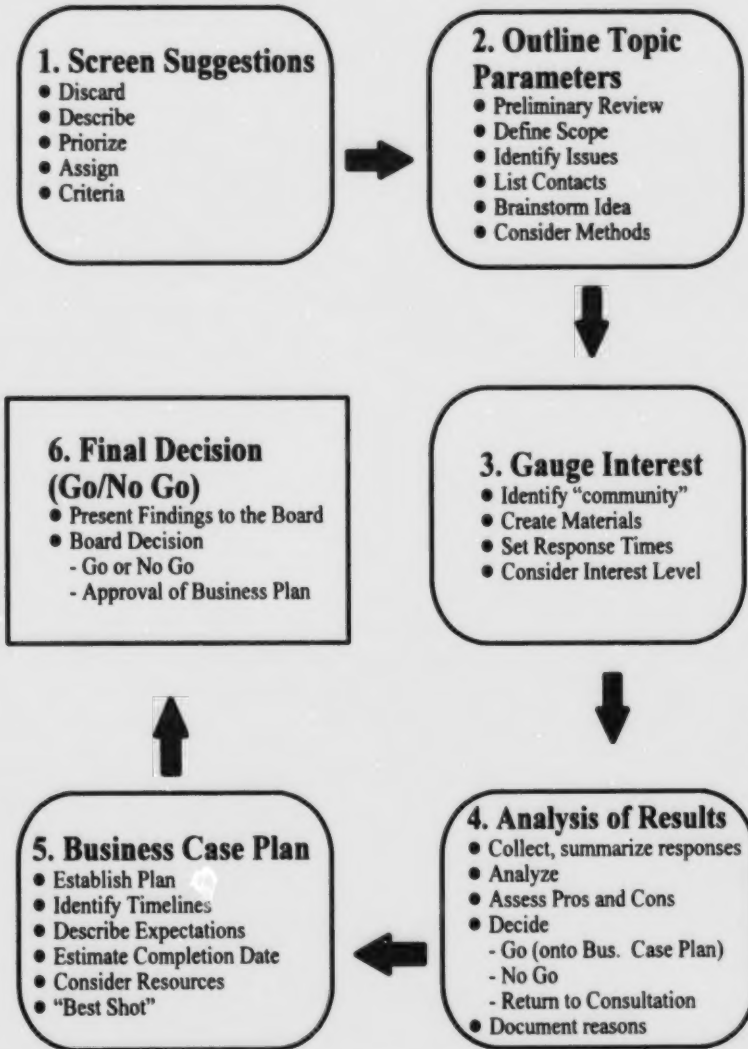
- each project must meet a perceived community need by providing a remedy for a deficiency in the law or in the administration of justice.
- a project must be one that neither the political process nor the administrative process is likely to deal with effectively.
- each project must be one that falls within the capability of the Institute, as a group of lawyers acting with the best available advice from segments of the public and from law and other disciplines.
- the total program must make contributions both to technical areas of law and to areas of law involving social policy.

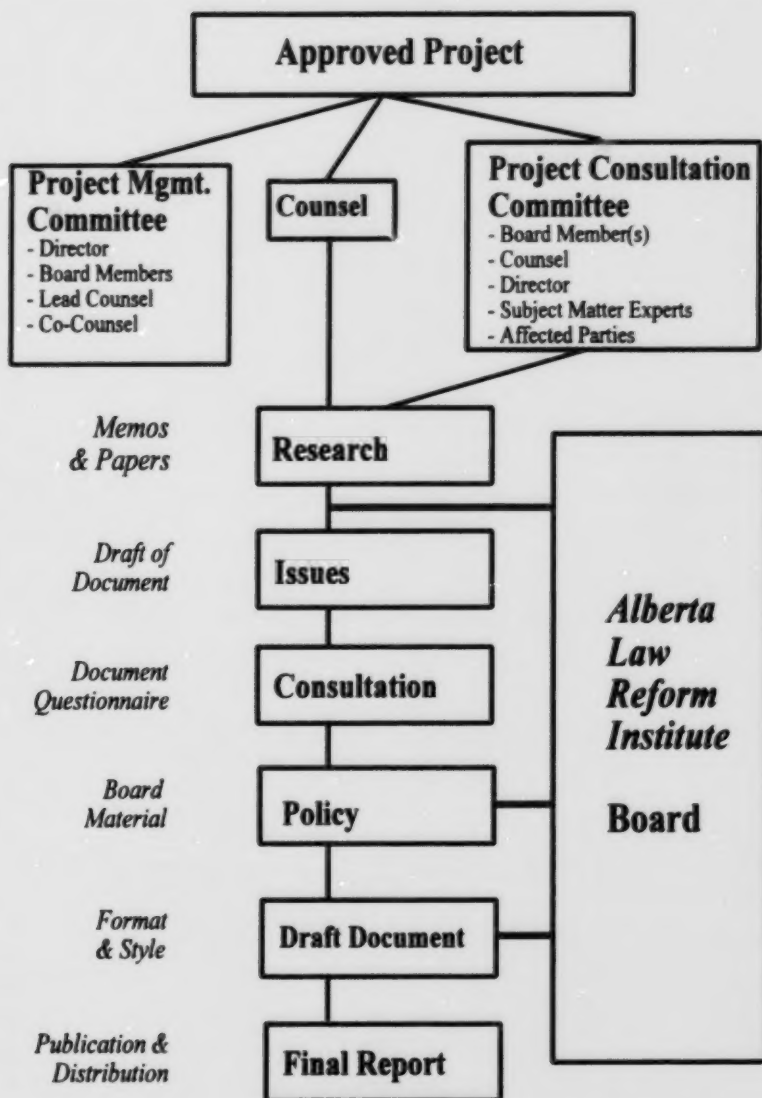
Methodology

Law reform must be an interactive process. We consult closely and continuously with our intended audience, initially to identify appropriate projects, and later to obtain feedback on issues and proposals. The quality of our product is directly related to our ability to recognize the needs of our audience, and to provide a sensitive response to them.

The methodology of the program is described on charts "**Should We Adopt a Project**" – from idea to approved Project and "**Approved Project**" from Project to Final Report. (See pages 9 and 10.)

Should We Adopt a Project?





Post Report Activity

Our work does not end with the final report. Significant post-report activity is involved in:

- explanations to "client" departments,
- response to legislative and drafting requests
- assistance to implementation groups
- presentation to legal profession

While reports are under consideration, we carry out a monitoring role to ensure that recommendations are kept up to date and other developments are taken into account.

Categories of Publications

While we tend to use different types of reports at different stages, the format is not rigid. Normally research papers merely share the results of our work. For example, our reports on Corporate Directors' Liability and Dispute Resolution processes were intended primarily to inform the ongoing debate. On the other hand, our report on Referees reviewed the history and proposed a practical change which was later implemented.

Normally our reports for discussion or consultation memoranda provide all the necessary background information for the reader to provide an informed response. Occasionally we will either update or replicate that information in a final report so as to make the Recommendations a more coherent whole. For example, our Final Report on Surrogate Rules was fairly brief because it was complemented by the Practice Manual which we prepared with the Legal Education Society of Alberta. Our reports on Arbitration and on Limitations are much fuller, and the annotated versions of the draft statute have proven very useful in the implementation process, and in the education process for the Bar once the legislation has been passed.

Finally, it is important to note the volume of reports which are now housed on our website, which provides a single entry point to the compendium of ALRI publications.

The five main types of documents produced by the Alberta Law Reform Institute are:

RESEARCH PAPER

Shared Data and Research
Early Release

ISSUES PAPER

Develops Policy Issues
Outlines Possible Solutions
Seeks Comment and Consultation

CONSULTATION MEMORANDUM

Focussed Policy Issues
Identified and Discrete Audience
Seeks Comment Prior to Final Proposals

REPORT AND RECOMMENDATION

Issues and Background
Proposed Solutions
Seeks Comment before Proceeding

Considered Position
Draft Legislation
Submission for Action



During this year ALRI issued three Consultation Memoranda, six Final Reports, and co-published with the Law Society of Alberta, a book written by W.H. Hurlburt, Q.C., Board Member and Director Emeritus of the Institute. The Executive Summaries are set out below.

Consultation Memorandum No. 7
Trustee Investment Powers

Introduction

[1] The legal concept of a *trust* describes a situation in which one person – the *trustee* – is the legal owner of certain property but must exercise their rights and powers as legal owner for the benefit of another person or persons – the *beneficiaries* of the trust – rather than for their own benefit.¹ The situation in which the legal owner of property must exercise their legal rights and powers as owner for someone else's benefit is often characterized as a separation of *legal* title from *equitable* title. The trustee is the legal owner of the trust property but the beneficiaries are the equitable owners.

[2] Broadly speaking, there are two types of trust: (1) trusts deliberately created by someone who originally holds both the beneficial and legal title to property and wants to split them up; (2) trusts that arise by operation of law, that is, where by virtue of a statute or judicial decision the legal owner of property is on trust for someone else, even though the legal owner might have had no intention of being a trustee. In this paper we focus primarily on the former sort of trust: one created by a deliberate act. Lawyers usually refer to a person who creates a trust that comes

¹ It is possible for one person to be both a trustee and a beneficiary. For example, A may hold property on trust for the benefit of A and B. This is but one of many subtleties of trust law that are largely ignored in this paper.

into effect while they are still alive as a *settlor* and to a person who creates a trust that comes into effect upon their death as a *testator*, but this paper simply refers to the *creator* of a trust. Similarly, we refer to the document that evidences the trust creator's intention to create a trust and sets out the terms of the trust as the *trust instrument*.

[3] The law of trusts gives a trust creator great latitude in formulating the terms of the trust: the set of duties, powers, authorities and discretions that governs the trustee in dealing with the trust property. Subject to broad constraints dictated by considerations of public policy, what the trustee may do, must do or may not do with the trust property is determined by the trust creator's intentions, insofar as those intentions are revealed by the trust instrument. This proposition applies to the investment of trust funds as well as to other aspects of a trust's administration. The trust instrument could limit the trustee to investing only in a handful of specifically identified securities or in a somewhat broader but still limited range of assets. At the other extreme, the trust instrument could authorize the trustee to make any investment that the trustee considers appropriate. Insofar as the trust creator's intentions regarding the trustee's investment duties and powers are clearly expressed in the trust instrument, they will be enforced by the courts.

[4] The issues under consideration in this project arise primarily in the context of trusts created by trust instruments that do not expressly define the trustee's investment authority.² The law abhors a vacuum. Therefore, if the trust instrument does not specify the trustee's investment duties and powers, the courts or the legislature must supply a *default rule* that fills the gap. In Alberta the default rule is provided by section 5 of the *Trustee Act*. The default rule provided by section 5 takes what has come to be known as the *legal list* approach to trustee investment. Under this approach, in the absence of a broader investment authority in the trust

² We say they arise "primarily" in the context of trust instruments that do not precisely define the ambit of the trustee's investment authority because we are concerned to some extent with trusts that arise by operation of law, where there is no trust instrument as such.

instrument, the trustee is confined to investing trust funds in assets that fall within certain categories identified by the statute.³

[5] The fundamental issue considered in this report is whether the *legal list* approach should be replaced with a more modern and flexible approach known as the *prudent investor* rule. Rather than categorizing certain forms of property as permitted trustee investments and prohibiting investment in other forms of property, the prudent investor rule focuses on the *process* by which a trustee makes investment decisions. The rule emphasizes the importance of establishing an investment strategy with risk and return objectives that reflect the nature of the trust and the circumstances of its beneficiaries. Whereas the legal list approach attempts to limit risk by prohibiting trustees from investing in forms of property that the legislature has determined to be inherently speculative or risky, the prudent investor rule focuses on *diversification* as the key to managing risk.

[6] If it is decided to replace the legal list approach with the prudent investor approach, a number of subordinate issues arise. The subordinate issues relate to such matters as how the prudent investor rule should be given legislative expression, and whether the legal list approach should be preserved in any contexts.

Consultation Memorandum No. 8

Wills: Non-Compliance with Formalities

Introduction

[1] Everyone is entitled to dispose of his or her property on death. That is one of our fundamental social policies.¹ The law gives effect to this fundamental social

³ See para. 9 of the Consultation Memorandum for a slightly more detailed explanation of the legal list approach.

¹ Other social policies impose limits on an individual's powers of disposition, but it is the existence of the power and not the limits placed on it which is relevant to this discussion.

policy by requiring that a deceased person's property be distributed according to the deceased person's will.

[2] However, the law says that a will is not effective unless the will and its execution meet certain requirements of form which are described below. It provides one set of formalities for formal wills; a second set for holograph wills; and a third set for the wills of mariners at sea and personnel of the armed forces on active service. Unless one of these sets of formalities is strictly complied with, a testator's testamentary dispositions will not be carried out. A will which does not comply with formalities cannot be admitted to probate.²

[3] Excluding from probate documents which do **not** reflect "testators'" intentions is obviously a good thing. However, excluding from probate documents which **do** reflect testators' intentions negates testators' right to dispose of their property on death is a bad thing. The existence of the possibility that the strict compliance rule excludes documents which reflect testators' intentions raises the question: should the law admit at least some documents to probate even though they do not strictly comply with the formalities?

[4] The Alberta Law Reform Institute has undertaken a project to determine whether or not some provision should be made for admitting to probate wills which do not comply strictly with the formalities but which represent the testamentary intentions of testators, and, if yes, what the provision should be.

[5] ALRI has moved this project to the top of its agenda now at the suggestion of a senior practitioner who cited a case of his own in which a failure to comply with formalities had raised difficulties (which, happily, were resolved). ALRI board members have also encountered situations in which difficulties have arisen, and members of the CBA Alberta Wills & Estates Section (Edmonton) mentioned an additional number, so that it seems appropriate to look into the subject with a view to deciding whether anything should be done.

² The later discussion will disclose some exceptions to this statement.

[6] ALRI is publishing this Consultation Memorandum in order to solicit information relevant to the ultimate questions and to solicit views based on a consideration of all relevant factors. It discusses a number of issues and solicits information and views with respect to them. It then raises the ultimate questions as follows:

1. Should it be possible to admit to probate a document which does not strictly comply with the formalities prescribed by the *Wills Act* for formal wills or holograph wills?
2. If the answer to Question 1 is yes, should the *Wills Act* be amended by
 - allowing wills to be probated if they are in "substantial compliance" with the prescribed formalities?
 - giving the court power to probate a document which does not comply with some or all of the prescribed formalities but which expresses the testator's intention?
 - providing some other form of relief for non-compliant wills?

[7] It should be noted that this project is not about the formalities themselves, which will remain as they are. The present formalities are actually quite easy to comply with, and, if complied with, they do give some foundation for an inference that the compliant will does reflect the testamentary intentions of the testator. The only question is whether or not some other forms of evidence of testators' intentions should be accepted in specific cases.

[8] Some opinions are expressed in this Consultation Memorandum. These are only the opinions of the drafter and are put forward for the purpose of discussion. They have not been considered or adopted by ALRI's Board, which will consider the topic in the light of the discussion in this Consultation Memorandum and in light of comment on the topic which ALRI receives.

Consultation Memorandum No. 9

Class Actions

The Problem: Alberta's Civil Justice System May Not Adequately Accommodate Class Actions

[1] Chemical storage tanks explode emitting noxious gases that spread over a nearby residential area. A large number of residents subsequently experience ill health. Their symptoms vary. A group of Alberta entrepreneurs solicit funds from investors around the globe for commercial development that does not take place as promised. The investment monies are not returned. Some of these investors relied on information in a prospectus that turned out to be false; others invested on the advice of brokers who acted as intermediaries. A large Alberta-based financial institution collapses and many persons of modest means stand to lose their hard-earned savings. Each had been assured, either in promotional literature or by officers of the company, that the financial institution stood on a solid footing and their money was safe. A roofing material deteriorates in 10 years instead of being good for 25 years as advertised by the manufacturers after testing and approval by government regulators. Owners of homes using this roofing material are prematurely put to the expense of having their roofs redone.

[2] The phenomenon of many individuals having the same or similar claims against the same defendant is a modern reality. Law suits are being brought in a wide variety of cases, including cases involving defective consumer or industrial products, misrepresentation of products or services, securities breaches, mass disasters and creeping disasters (such as injury to health over a prolonged time period or environmental damage).¹

¹ The ManLRC Report gives a detailed account of the types of litigation that can involve multiple plaintiffs with similar claims:

Class actions are useful in tort cases for mass disaster claims (claims arising from single incident mass accidents, such as train derailments and environmental disasters) and for creeping disaster claims (claims for bodily injury arising from consumer products, such as tobacco and asbestos, or medical products, such as intra-uterine devices, breast implants, contaminated blood, jaw implants, silver mercury filings and heart pacemakers). Other uses include "claims of group defamation, nuisance, the principle in *Rylands v. Fletcher*, various statutory torts, damages

[3] But is the civil justice system keeping up with the times? Do the processes currently available to deal with such claims meet the fundamental principles of a civil justice system? Do they proceed in a way that is fair to the interests of both plaintiffs and defendants? Can they be readily known? Is their application certain? Are they efficient? Do they keep time and expense in check?

[4] Many people think not. Some have gone so far as to state that "the legal system requires overhaul in order to deal properly with multi-plaintiff actions."²

[5] The problems are particularly apparent in cases where the number of claimants is large but the individual damages are small, and in cases where the evidence required to make out the claim is technical and complex. The litigation process in circumstances such as these can be costly, slow and cumbersome. Many persons simply cannot afford the justice the system offers. Indeed, recommendations from the Alberta Summit on Justice held in Calgary, January 27-29, 1999 urged the government to examine "ways to expedite the current justice process and make it more affordable" and "ways to simplify the present justice system so that it is more 'user friendly' and less complicated and intimidating".³

claims for breach of *Charter* rights, claims arising from illegal strikes, negligent house construction, and negligent misstatement" (ManLRC Report at 17-18).

Class actions are useful in contract cases for consumer claims for defective products, such as defective toilets, house siding, plastic blinds and heaters. Other uses include misrepresentations, wage and wrongful dismissal claims, disputes over franchise agreements, claims against educational institutions. (ManLRC Report at 18-19)

In the United States, class actions are useful in commercial law for securities cases arising out of a breach of fiduciary obligations, a failure to disclose or negligent or misleading representations, but securities and other commercial law class action claims are not common in Canada. (ManLRC Report at 19-20).

² ManLRC Report at 3, concurring with and quoting from the Woolf Report at 223 on the situation in England and Wales at 223.

³ Recommendations, *Report of the All-Party MLA Public Consultation* (which formed the basis for discussion at the Alberta Summit on Justice). The core recommendations in the *Final Report of the Alberta Summit on Justice* included a recommendation that "the language, procedures, and accessibility of the justice system be simplified, made more user friendly, and made easier to understand" and that "recommendations contained in previous studies and report ... be reviewed and implemented". In the Response of the Government of Alberta to the *Final Report, Alberta Summit on Justice*, the Government states its commitments to the eight main themes and 25 core

[6] One of the goals of the civil justice system should be to "achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner".⁴ This point can be expressed in different ways. If plaintiffs are unable to pursue their rights in court, defendants will not be held accountable for their acts. By giving plaintiffs access to the courts, the civil justice systems helps to regulate conduct in the community. Indeed, one objective identified for class actions is the modification of wrongful behaviour on the part of actual or potential defendants.⁵

[7] The problems with the procedural mechanisms currently available in civil justice systems to handle cases in which a number of plaintiffs have the same or a similar interest in the subject matter of the litigation have been apparent throughout the British Commonwealth—in Canada,⁶ the United Kingdom,⁷ Australia,⁸ Scotland⁹ and South Africa.¹⁰ As Lord Woolf observed, of England:¹¹

recommendations put forward in the Report of the Justice Summit. These include "simplifying access to the justice system" (theme two) and "taking action on previous studies and reports on justice" (theme seven).

⁴ Woolf Report at 223, §2, quoted in ManLRC Report at 3.

⁵ *Abdool v. Anaheim Management Ltd.* (1) (1993), 15 O.R. (3d) 39 at 45-46 (Gen. Div.), citing OLRC Report; aff'd *Abdool v. Anaheim Management Ltd.* (2) (1995), 21 O.R. (3d) 453 at 462 (Div. Ct.).

⁶ CBA Report (August 1996); Man Task Force Report (1996); Ont Advisory Committee Report (1990); BC Consultation Document (May 1994); ManLRC Report (January 1999).

⁷ Woolf Report (1996).

⁸ ALRC Report (1988); VLRAC Report (1997); NSW Briefing Paper (1996).

⁹ SLC Report (1996).

¹⁰ SALC Report (1997).

¹¹ ManLRC Report at 1-2, quoting from the National Consumer Council in its submission to Lord Woolf's inquiry in England.

As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others.

[8] The Supreme Court of Canada recognized the inadequacies of the existing law in 1983 in the case of *Naken v. General Motors of Canada Ltd.* when it identified "the need for a comprehensive legislative scheme for the institution and conduct of class actions".¹² According to the Court, the lack of detail in the historic "representative action" rule (in Alberta, Rule 42) meant that it was not intended to impose a new and distinct method of proceeding upon the generally established pattern of procedure and was inadequate to launch a complex and uncertain action.

[9] The Alberta Court of Appeal recognized the inadequacies of the existing law in 1998 in the case of *Western Canadian Shopping Centres, Inc. v. Dutton*.¹³ The Court applied Rule 42 in this case, but commented, albeit *in obiter*, that "this area of the law is clearly in want of legislative reform to provide a more uniform and efficient way to deal with class action law suits".¹⁴

[10] Because of the inadequacies, Albertans who face barriers to bringing their own action in Alberta are sometimes obliged to join litigation proceedings brought in other jurisdictions in order to obtain relief. For example, Alberta women who had silicone gel breast implant claims chose to join a British Columbia class action rather than attempt action under Alberta Rule 42.¹⁵

¹² (1983), 144 D.L.R. (3d) 385 at 410.

¹³ (1998), 228 A.R. 188.

¹⁴ The S.C.C. granted leave to appeal and cross-appeal this decision on Dec. 9, 1999, [1999] S.C.C.A. No. 59, online: QL (AJ).

¹⁵ *Harrington v. Dow Corning Corp.* (1), (1996), 48 C.P.C. (3d) 28, 22 B.C.L.R. (3d) 97 (S.C.); *Harrington v. Dow Corning Corp.* (2), (1997), 29 B.C.L.R. (3d) 88 (S.C.); *Harrington v. Dow Corning Corp.* (3), unreported (January 29, 1999), Vancouver C954330 (B.C.S.C.). An Alberta resident was the representative plaintiff for the non-resident subclass in *Chace v. Crane Canada Ltd.* (1996), 5 C.P.C. (4th) 292, aff'd 14 C.P.C. (4th) 197 (B.C.C.A.).

[11] In assessing the situation in England and Wales, Lord Woolf concluded that "[the absence of specific rules of court for multi-party actions] causes difficulties when actions involving many parties are brought". He went on to observe that, "[i]n addition to the existing procedures being difficult to use, they have proved disproportionately costly" and that "[i]t is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach" to court procedures. We think that Lord Woolf's observations apply equally well to the current situation under Alberta's civil justice system.

[12] On the basis of this information and concerns that have been expressed to us by the Benchers of the Law Society of Alberta and a number of lawyers who have represented plaintiffs or defendants in multiple-plaintiff similar-claim litigation in Alberta, we have determined that there is significant interest in reform of the law in this area and, clearly, an issue that should be addressed.

Final Report No. 79

Powers and Procedures for Administrative Tribunals in Alberta

[1] The existing legislation that governs the procedures of adjudicative tribunals in Alberta—the *Alberta Administrative Procedures Act*—is seriously deficient. This act has not kept up to date with developments in the law respecting fairness and fundamental justice, nor with new methods and processes that can help make tribunals more efficient in terms of the use of their resources, and better-equipped to run their hearings effectively. The act is also very limited in its coverage, applying to only a small proportion of Alberta's adjudicative tribunals. Our purpose is to provide procedural rules that take into account case law developments relative to the requirements of natural justice, and new procedures to enhance efficiency and effectiveness, and to make them more widely available. The Model Code of powers and procedures provides such rules and makes them available to all tribunals.

[2] The bodies whose procedures are in question are very diverse in terms of their functions and resources. A serious challenge of the project was to provide a single body of rules that would be useful to all of them. The Institute responded to

this challenge in two ways. First, at a very early stage we turned to the users of the procedures—those who appear before tribunals, and the tribunals themselves—for input as to what the Code's provisions should be. We asked our consultants to tell us not only how particular rules would work for their own tribunals, but also to reflect as to how they would serve as part of a generic set of rules. Second, in consultation with these groups, we developed a novel method for implementing the Code's provisions: 'opt-in' legislation under which tribunals may apply for a ministerial order (to the Minister of Justice) to make selected provisions operative for them. This method responds to diversity. It has the added and very important benefit of locating the powers and procedures of administrative bodies in a single, visible location, readily accessible to users and conducive to the development of a common practice and precedent. The role of the Minister of Justice in approving selected provisions will help also ensure consistency in tribunal practice.

[3] The first Chapter of our Report sets out the shortcomings in the existing legislation and the steps we took to address this problem—the development of a modernized Model Code of powers and procedures, to be legislated as an 'opt-in' statute. It describes the intensive consultation process that we undertook to enable us, together with our consultants, to craft provisions sufficiently general for use by many bodies, and to create an implementation plan that would make the Code's provisions operative for those who need them.

[4] Chapter 2 of the Report sets out a number of principles on which the Model Code's provisions are based. The first section recognizes the way in which tribunals are different from courts, and the special powers they need to accommodate these differences. They need to control their own processes to reflect the very disparate types of decision-making in which they engage. In order to fulfill their mandate, many of them also need to obtain information beyond that supplied to them by persons that appear before them. The remaining principles have already been mentioned: fairness and natural justice, efficiency, effectiveness, and the benefits of centralization. This Chapter also notes which of the Code's provisions are tied to the particular principles.

[5] The third Chapter contains the Institute's recommendations with respect to the implementation process. We recommend the enactment of an *Administrative Powers and Procedures Act* that replaces the existing *Administrative Procedures Act*. Under the terms of this proposed statute, tribunals may apply for a ministerial order to make the provisions of the Code that they have selected a part of their own procedural rules. As the existing *Administrative Procedures Act* is administered by the Department of Justice, we recommend that the Minister of Justice be the approving Minister under the new legislation. We also recommend that each government department include in its business plan a requirement that every tribunal established under the legislation for which the department is responsible (or someone on their behalf) undertake a review of the Code and make the appropriate selections from it. We also discuss what use can be made of the Model Code before the recommended legislation is passed.

[6] The next section of the Report is the Model Code itself. The Code is divided into four sections: pre-hearing, the hearing, decision and reasons, and miscellaneous. Each section is prefaced by an overview.

[7] Part 1, 'Pre-hearing procedures', deals with all the matters a tribunal should consider before holding a hearing. It is largely concerned with tribunal efficiency, and includes steps tribunals may take to avoid unnecessary hearings in specified situations, such as where a proceeding would be an abuse of process, or where the participants consent to a disposition. Other examples of ways in which unnecessary hearings can be avoided pursuant to the provisions in Part 1 include the following:

- a tribunal may state a case for a court to determine a matter
- a tribunal may hold a generic hearing that decides a matter of interpretation or policy that avoids a multiplicity of related applications
- a tribunal may combine two or more applications into a single consolidated hearing
- a matter may be rerouted to ADR proceedings to allow the participants to come to a mutually acceptable resolution.

Part 1 also allows for pre-hearing conferences and sets out the matters that may be dealt with in such conferences.

[8] Part 2 deals with the hearing itself. Some of the provisions in this part are meant to ensure that tribunals meet the requirements of natural justice in the hearing context. Others allow hearings to be conducted more efficiently, or effectively. Many of the provisions combine all these concerns. The provisions under this part deal with: who is entitled to participate and what notice and information is to be given to participants; the form of the hearing (whether public or private, whether oral, written or in electronic form); how evidence is to be compelled and received and what evidence is to be admitted; participants' rights to representation and participation; and the duties of the tribunal with respect to creating a record of the proceedings.

[9] Part 3 deals with the matters that pertain to the result of the decision making process—the decision and reasons. The section deals with formal requirements relative to the decision such as the need for a written version, the requirement that notice of the decision be given to participants and that it be publicly available, and that tribunals develop time lines for issuing decisions. The most important requirement is that reasons be given for all decisions, a requirement from which we feel no tribunal should be exempt. The section also sets out guidelines for staff involvement in decision making. Another significant provision is that which allows tribunals to review or rehear matters in which a decision has already been issued; this provision deals with the propriety of reconsideration in a variety of circumstances.

[10] The final part, Part 4, deals with powers and procedures that do not fall easily within any of the foregoing categories, or strictly within a tribunal's decision-making function. The first question addressed is whether the Model Code should distinguish among classes of cases to which different levels of formality apply, and assign different procedures to each class. (We rejected this approach in favour of the availability of a full continuum of formality for all decision-making, adaptable by tribunals to meet the needs of a given case.) The remaining topics deal with the following discrete subject matters: control over process; enforcement, contempt; appeals; costs; extensions of time; *ex parte* decisions; maintaining order at a hearing; visibility of procedures; bias; provision of interpreters; service of documents.

[11] The Code's provisions are also accompanied by Explanatory Notes, which are meant to help tribunals decide whether they need the provision, and provide guidance as to how it is to be interpreted or applied. Many entries also highlight related case law, which is meant as a starting point for further research where this is needed.

[12] We hope that the legislated 'opt-in' Model Code has met the challenges of bringing administrative procedures legislation up-to-date and making it generally available to tribunals and tribunal users. The next challenge will be to ensure that the Code continues to keep up with developments in law and tribunal practice.

Final Report No. 80
Trustee Investment Powers

OVERVIEW

The powers and duties of a trustee with respect to the investment of trust property are governed by the instrument that created the trust. If, however, the trust instrument does not expressly define the scope of the trustee's investment powers, it is defined by section 5 of the *Trustee Act*.

Section 5 is an example of what has come to be known as the *legal list* approach to the statutory definition of trustee investment powers. Under this approach, a trustee may invest trust funds only in types of property (usually securities of one sort or another) identified in the statute, unless the trust instrument provides broader investment powers. The purpose of restricting trustees to investing in the specified types of property is to prevent them from exposing the trust capital to undue risk. The legal list approach developed in the United Kingdom in the nineteenth century. Until the last twenty years or so, trustee statutes in the United Kingdom, Canada, Australia and New Zealand all followed some version of the legal list approach.

Over the last twenty years, and especially in the last five, most Commonwealth jurisdictions have replaced the legal list approach with the *prudent*

investor approach. Under the latter a trustee is not restricted to investing in types of property identified in a statutory list. Statutes implementing the prudent investor approach focus on the process by which trustees make investment decisions and stress the importance of considering the interrelationship between different components of the trust portfolio. Instead of attempting to control risk by restricting trustees to a list of ostensibly safe investments, the prudent investor approach emphasizes the importance of intelligent diversification as a means of controlling risk.

The prudent investor approach is an elaboration of an approach called the *prudent man* rule that has long been followed by most jurisdictions in the United States. New Zealand adopted the prudent investor rule in 1988, and all Australian states have now done likewise. It appears that the United Kingdom will soon replace its version of the legal list approach with the prudent investor rule. Alberta is one of four Canadian provinces—the others being British Columbia, Quebec and Newfoundland—that have not yet adopted either the prudent man rule or the prudent investor rule.

The central recommendation of this report is that Alberta should follow the trend of legislation in other jurisdictions and replace the legal list approach with the prudent investor rule. We make this recommendation not to follow a trend but because we believe that the jurisdictions that have adopted the prudent investor rule have acted on the basis of sound theoretical and practical considerations. Legislation to implement the prudent investor rule in Alberta would take advantage of the Uniform Law Conference of Canada's *Uniform Trustee Investment Act, 1997*.

SUMMARY OF CHAPTERS

Chapter 1—Introduction

This chapter provides a slightly more detailed introduction to the matters discussed in this report than is provided in this summary. It also describes the process that has culminated in the issuing of this report.

Chapter 2—Trustee Investment Powers

This chapter has two main sections. The first describes the existing law relating to trustee investment powers in Alberta. The second provides a brief description of the evolution of legislation relating to trustee investment powers in Alberta and other jurisdictions.

Chapter 3—Analysis and Recommendations

This chapter, which contains all of our recommendations, is divided into three main sections. The first section asks how well the legal list approach can be expected to fare in practice as a means of preventing trustees from exposing the trust to undue risk. The answer is, "not all that well."

The second section contains the report's fundamental recommendation, which is that the legal list approach be replaced with the prudent investor rule (Recommendation 1). It also contains a recommendation that the prudent investor rule apply to all trusts and to statutes that incorporate the *Trustee Act*'s investment powers by reference, unless the relevant trust instrument or statute expresses a contrary intention (Recommendation 3). There is a specific recommendation that attorneys acting under an enduring power of attorney be subject to the prudent investor rule (Recommendation 2).

The third section deals with the details of implementing the prudent investor rule. For the most part, we recommend enactment of provisions based on the *Uniform Trustee Investments Act, 1997*. There are, however, a few instances where we would not follow the precise wording of the Uniform Act. The principal recommendations in this section are to the following effect, keeping in mind that all of these recommendations would be "trumped" by a contrary intention expressed in the trust instrument:

- Trustees should be able to invest in any type of property, so long as the investment is in accordance with the standards of prudent investment (Recommendation 4).

- Trustees should be directed to invest trust property with a view to obtaining a reasonable return while avoiding undue risk in the context of the overall trust portfolio (Recommendation 5).
- Trustees should be directed to consider specified matters when planning the investment of trust property (Recommendation 6).
- A trustee should not be liable for a loss arising from the investment of trust property if a reasonably skilled and prudent trustee acting in accordance with the standards of prudent investment could have made the decision or followed the course of action that led to the loss (Recommendation 7).
- Trustees should be able to delegate investment authority to agents to the extent that a prudent investor might do so in accordance with normal investment practice (Recommendation 9). The trustee must exercise prudence in selecting, instructing and monitoring the agent (Recommendation 10).

Other recommendations deal with: quantification of damages (Recommendation 8); liability of a trustee who has delegated investment authority to an agent for the agent's actions (Recommendation 11); actions against the trustee's agent (Recommendation 12); whether investing in mutual funds constitutes delegation of investment authority (Recommendation 13); and registration of securities in the name of the trustee (Recommendation 14).

Appendices

The report concludes with three Appendices. Appendix A sets out the provisions of the *Trustee Act* that would be replaced by legislation implementing our recommendations. Appendix B lists statutes that incorporate the *Trustee Act*'s investment provisions by reference. Appendix C contains of draft legislative provisions based on our recommendations.

Final Report No. 81

Occupiers' Liability: Recreational Use of Land

Introduction

The Minister of Justice requested a report regarding the liability of occupiers of land to recreational users permitted on their premises without payment of a fee. This report is the response to that request. However, this is not a typical ALRI report. We do not provide a recommendation as to whether this aspect of occupiers' liability law should be reformed. The primary reason for this is that we lack adequate information about the potential problem to be solved, and we lack the resources to compile that information.

While our report does not make a recommendation as to whether the *Occupiers' Liability Act (OLA)* should be reformed, it does suggest matters to be taken into account in making this threshold decision. In addition, the report contains an extensive discussion of the issues that should be canvassed if a change is to be made to the existing law of occupiers' liability. Simply put, the purpose of this report is to inform the decision-making process.

Summary of Chapters

Chapter 1

This chapter sets out how ALRI has approached the Minister's request, and the explanation for the approach that has been taken. It provides a brief summary of the current law of occupiers' liability in relation to non-commercial recreational users (NCRUs) who are invited to or permitted on premises. The reform which has already taken place in this area by virtue of the *Agricultural Dispositions Statutes Amendment Act, 1999 (ADSAA)* is explained. Finally, this chapter introduces the question of what the new legal relationship between occupiers and NCRUs might be, if the existing relationship is to be changed.

Chapter 2

Chapter 2 raises some general matters that should be examined in deciding whether occupiers' liability law should be reformed. We divide these matters into

two sections. The first section considers the possible impact that the suggested reform might have on NCRUs and emphasizes the need to assess whether the potential benefit outweighs any potentially negative impact. The second section examines the policy behind the *OLA* as originally enacted and discusses whether the suggested reform is consistent with that policy.

Chapter 3

The bulk of the report is contained in Chapter 3. This chapter sets out different approaches that could be taken to amending legislation, if a decision to reform is made.

There are six main areas to address in considering amending legislation:

1. The premises to which the amending legislation could apply;
2. The occupiers who could be covered by the amending legislation;
3. The recreational activities that could be encompassed by the amending legislation;
4. The types of recreational entrants who could be subject to the amending legislation;
5. To what extent, if at all, the amending legislation should apply to occupiers who are compensated for the recreational use of their land;
6. The nature of the reduced duty that would be owed under the amending legislation.

We provide three basic choices for each area of discussion, depending on whether the scope of the reform is to be narrow, broad, or intermediate. In combination, these choices illustrate the wide variety of approaches that can be taken to creating recreational use legislation. The basic choices for each matter are summarized in table form at the beginning of the chapter. For ease of reference they are also summarized in written form below.

1. To what premises should the amending legislation apply?

- (a) specific kinds of land?
- (b) land identified by specified characteristics?

(c) all land or land broadly defined?

2(1). To what occupiers should the amending legislation apply?

- (a) only private occupiers?
- (b) private occupiers and some public occupiers?
- (c) all occupiers, both private and public?

2(2). Should the amending legislation require occupiers to open their land to the public?

- (a) generally?
- (b) with reasonable limitations?
- (c) at all?

3. To what recreational activities should the amending legislation apply?

- (a) specific activities?
- (b) activities with certain characteristics?
- (c) all activities or activities broadly defined?

4(1). To what extent should the amending legislation apply to child NCRUs?

- (a) not at all?
- (b) to a lesser extent than adult NCRUs?
- (c) to the same extent as it applies to adult NCRUs?

4(2). To what extent, if at all, should the amending legislation apply to social guest NCRUs?

- (a) not at all?
- (b) to a lesser extent than other NCRUs?
- (c) to the same extent as it applies to other NCRUs?

5. What types of compensation should preclude application of the amending legislation?

- (a) any direct or indirect monetary payment or other benefit in exchange for permitting recreational access?

(b) certain types of direct monetary payment or other consideration in exchange for permitting recreational access?

(c) only direct monetary payments?

6. If the occupier's duty to NCRUs is to be lowered, what should the lower duty be?

(a) a level of liability which is less than the common duty of care, but greater than the liability imposed on an occupier towards a trespasser?

(b) the same liability as that imposed on an occupier towards a trespasser?

Final Report No. 82

Cost of Credit Disclosure

Introduction and Summary

(1) Unlike most Alberta Law Reform Institute ("ALRI" or "Institute") final reports, this report does not recommend specific changes to a body of law. This report is intended to serve the following purposes:

- to describe the general objectives and contours of a body of law that can be most succinctly described as cost of credit disclosure legislation ("ccdl");
- to describe the "harmonization process" that has recently resulted in significant changes to ccdl in Alberta and should lead to similar changes to the ccdl of all other Canadian jurisdictions—federal, provincial and territorial—in the near future;¹
- to summarize the Institute's role in the harmonization process, as part of our responsibility to report on the Institute's law reform activities;
- to suggest areas in which there may be scope for improvement of Canadian ccdl without departing from policies that have recently been agreed to by all Canadian jurisdictions.

¹ The projected implementation dates for harmonized cost of credit legislation in different Canadian jurisdictions are set out on the Industry Canada web site at <<http://strategis.ic.gc.ca/SSG/ca01086e.html>>.

[2] Between 1987 and September 1, 1999, Alberta's ccdl was embodied in the *Consumer Credit Transactions Act* ("CCTA"). On the latter date the CCTA was repealed by the *Fair Trading Act* ("FTA"). Cost of credit disclosure in Alberta is now governed by Part 9 of the FTA and its associated regulation, the *Cost of Credit Disclosure Regulation* ("CCDR").

[3] None of the provisions of FTA Part 9 (or any other provisions of the FTA) is based on a formal recommendation of the Institute. Indeed, as explained later in this report, at a fundamental level FTA Part 9 departs from the approach the Institute would have recommended. Nevertheless, although the Institute has not made any formal recommendations on the content of ccdl, we have provided considerable input into the process that lies behind the enactment of FTA Part 9. We are therefore in a position to provide an overview of that process and its results.

[4] After this introduction the report is divided into four main sections plus a brief conclusion. The first of these, section B provides an overview of ccdl. It briefly describes the objectives and evolution of such legislation, with an emphasis on the harmonization process that lies behind FTA Part 9. Section C then describes the broad contours of FTA Part 9.

[5] Section D returns to the harmonization process to discuss a controversy that arose during that process. The controversy related to mandatory disclosure of the annual percentage rate ("APR"). Mandatory APR disclosure has been a central feature of Canadian (and other countries') ccdl since the 1960s. In the early nineties, however, ALRI and Uniform Law Conference of Canada ("ULCC") proposed to move away from mandatory APR disclosure in most contexts. Ultimately, the officials responsible for determining the policy to be implemented by harmonized ccdl decided to retain mandatory APR disclosure. Nevertheless, we think it is worthwhile to describe in general terms why ALRI-ULCC were proposing to abandon mandatory APR disclosure (in most contexts) and what we were proposing in its place.

[6] Section E makes some suggestions as to aspects of FTA Part 9 where there appears to be scope for improvement within the framework of the policies that have recently been agreed to through the harmonization process. The suggestions in section E are not that the Alberta government should unilaterally make any particular changes to FTA Part 9 or the CCDR. Rather, they are suggestions about areas in which coordinated tinkering by Alberta and other Canadian jurisdictions may be appropriate.

Final Report No. 83

Division of Matrimonial Property on Death

Nature of the Problem and General Direction for Reform

The problem addressed in this report arises because different principles govern matrimonial property law and succession law. The right to share matrimonial property upon marriage breakdown is rooted in the view of marriage as a partnership. It is presumed that each spouse contributes equally and independently to the marriage and to the acquisition of property and is, therefore, entitled to an equal share of the assets acquired during the course of marriage. One consequence of the presumption of equal sharing is that as between the spouses it does not matter who holds title to the matrimonial property. In contrast, succession law is concerned with testamentary freedom of the individual in respect of the property he or she owns. The testator's intention rules supreme, and if the testator does not wish to recognize the spouse's contribution to the marriage, succession law respects this right. Title to property becomes very important. The principle of testamentary freedom is tempered somewhat by the right of the spouse to seek family relief, but until recently, family relief looked more to the need of the surviving spouse and not to his or her contribution to the accumulation of the deceased's assets.

It is this conflict between the underlying principles of matrimonial property law and succession law that causes unfair results for a surviving spouse who under the existing law does not have a cause of action under the *Matrimonial Property Act* ("MPA") upon the death of the spouse. Until 1994, a surviving spouse who

had remained in the marriage could receive less under the *Family Relief Act* than he or she would have received upon marriage breakdown. The Supreme Court of Canada sought to address this problem in its 1994 decision in *Tataryn v. Tataryn Estate* that dealt with legislation that is similar to Alberta's *Family Relief Act*. In that case, the Court interpreted provision for the surviving spouse that is "adequate, just and equitable" as including, at a minimum, what the surviving spouse would be given upon marriage breakdown. In coming to this conclusion, the Court was influenced by two ideas. First, the Act must be read in light of modern values and expectations. Second, it is desirable that the rights that may be asserted against the testator before death be symmetrical with those that may be asserted against the estate after his or her death.

We think the policy expressed in this decision is sound. The surviving spouse of a marriage terminated by death should not have less remedies than the spouse in a marriage terminated by divorce. The contribution of a spouse to a marriage should be recognized either on marriage breakdown or on death. There are three ways to ensure that the surviving spouse gets his or her fair share of the matrimonial property: (1) election of a fixed share, (2) expanded judicial discretion under the *Family Relief Act*, of which *Tataryn* is an example, and (3) deferred sharing of matrimonial property upon death. In our opinion, *Tataryn* presents only a partial solution to the problem and not the best solution. The third option is the preferred method of reform.

The reform we envisage is for the benefit of the surviving spouse and not for the benefit of the estate of the deceased spouse. Consequently, while the surviving spouse can commence an action against the estate of the deceased spouse, the estate cannot commence an action against the surviving spouse. The only exceptions to this rule occur when an action has been commenced by either spouse during their joint lives. If the deceased spouse commenced the action before his or her death, the estate can continue the action. If the surviving spouse commenced the action before the death of the deceased spouse, the estate can file a statement of defence and counterclaim. Furthermore, the surviving spouse should not be able to discontinue the action without the consent of the personal representative of the deceased spouse, or leave of the court.

Overview of existing Matrimonial Property Act

To understand the recommendations made in the report, the reader will need to have a basic understanding of the MPA as it now operates. Therefore, Chapter 3 contains a brief summary of this area of the law. This discussion will be of value to wills and estates lawyers who do not practice extensively in the area of family law. It will also be of value to lawyers who have such experience but who are interested in how the MPA operates when the action is commenced after the death of one of the spouses.

Division of matrimonial property on death

Our recommendations for change to the MPA, which are found in Chapter 4, are summarized as follows. Presently, the surviving spouse can bring a matrimonial property action upon the death of the deceased spouse only when marriage breakdown occurred during the joint lives of the spouses. The MPA should be amended so that marriage breakdown is no longer a precondition to bringing the action. Upon death of a spouse, the surviving spouse should be able to seek division of property acquired over the course of the marriage no matter how harmonious or inharmonious the relationship. Previous division of the matrimonial property according to a matrimonial property order or settlement agreement would be a bar to an action on death unless the couple had reconciled in the interim. The existing limitation period of six months from the grant of probate or letters of administration would apply.

Subject to certain changes, division of property on death will take place as it now does. The general law regarding exempt, distributable and divisible property would remain unchanged as would the court's ability to deviate from equal sharing in the appropriate circumstances. Also, the law regarding valuation date and the treatment of debts and liabilities would remain unchanged. This means that in most cases the valuation date will be the date of trial and the court will consider all of the property and debts of either spouse as of that date. Our recommendations would bring about change in respect of what is brought into account on death. The MPA should be amended to ensure that all property that passes outside the estate to the surviving spouse is treated as property of the surviving spouse for the purposes of the accounting under the Act. This changes the law as stated in *Dunn*

Estate v. Dunn. In addition, life insurance proceeds paid to the surviving spouse by reason of a policy owned by the deceased spouse will be treated as property of the surviving spouse. Such property will no longer be exempt property. Also, funeral and testamentary expenses will be treated as a debt of the deceased spouse.

In Chapter 5, we examine the interaction between the proposed right to seek division of matrimonial property on death and rights presently available to the surviving spouse on death of the deceased spouse. The latter rights include the right to receive property by way of will or intestacy and rights that arise under the *Dower Act* and the *Family Relief Act*. We recommend that the surviving spouse be entitled to his or her rights under the MPA in addition to any property that would flow to the surviving spouse by way of will or intestacy after satisfaction of debts of the estate and the matrimonial property order. In an earlier report, we have recommended that the dower life estate be replaced with a right to occupation under Part 2 of the MPA. The right of occupation would exist until varied by court order. The recommendations concerning reform of dower rights fit well with the recommendations made in this report. In the event of an application to vary the occupation right, the court should consider the assets available for the support of the surviving spouse including the matrimonial property entitlement. The proposed matrimonial property rights would also coexist with the rights of the surviving spouse under the *Family Relief Act*. As is now the case, the matrimonial property action may be joined with an application for family relief.

Administration of the estate

Chapter 6 deals with the issues that arise in the administration of an estate faced with a matrimonial property claim. Presently, a combination of matters will determine how beneficiaries are affected by a matrimonial property order: the terms of the matrimonial property order itself; the marshalling rules that govern the order in which assets are used to satisfy debts; the composition of the estate; and the terms of the will. We recommend that this system be replaced. In the absence of directions in a will, the burden of the matrimonial property order should fall ratably on all beneficiaries of the estate in proportion to the value of their respective interests after payment of all funeral and testamentary expenses, and debts and liabilities.

We also make recommendations governing the priority of payment of claims against the estate. Subject to payment of secured creditors and the federal Crown, the proposed order is as follows: (1) reasonable funeral expenses, (2) reasonable testamentary expenses, (3) all unsecured debts (including debts due to the provincial Crown) and liabilities in existence at the time of death, if any, (4) family relief order, if any and (5) distribution of the estate under the will or intestacy. Maintenance orders would rank equally with a money judgment made in a matrimonial property order and other unsecured debtors.

The remainder of the recommendations in Chapter 6 deal with the notice given to the surviving spouse by virtue of section 7 of the *Administration of Estates Act* and the timing of the distribution of the estate. The circumstances in which the personal representative must serve the section 7 notice should be broadened to accommodate recommendations we make in respect of assets that pass outside the estate. The personal representative can distribute the estate no earlier than 6 months from the grant of probate or administration. Furthermore, where an action is commenced during this period, the personal representative of the deceased spouse must hold the estate subject to any matrimonial property order that is made.

Will Substitutes

Chapter 7 deals with the thorny question of will substitutes that pass to third parties. The term "will substitutes" describes assets that pass outside the estate and includes property held in joint tenancy, property that passes by way of beneficiary designation, *donatio mortis causa*, inter vivos trusts by which the settlor keeps the benefit and control of the assets until death, and life insurance. Several judicial decisions demonstrate that will substitutes are an effective means to deplete the estate and thereby diminish or defeat any claim that can be brought only against the estate. To ensure that division of matrimonial property on death cannot be easily circumvented, we recommend that for the purposes of calculating the entitlement of the surviving spouse, will substitutes that pass to third parties be treated as property of the deceased. We also recommend that certain will substitutes fall into the category of exempt property. Exempt property would include any will substitute that is used to satisfy an existing debt or liability of the

deceased spouse and any will substitute that serves a legitimate business purpose. If the estate is insufficient to satisfy the matrimonial property order, the surviving spouse would then be entitled to seek satisfaction of the deficiency from the recipients of the will substitutes. The recipients would have to contribute proportionately to satisfaction of the claim. See Chapter 7 for the actual recommendations and supporting reasoning.

Transition

We recommend that these recommendations apply to:

- (a) all individuals who die intestate after the date the amendments come into force,
- (b) all individuals who die with a will wherein it is expressly stated that the will is made in contemplation of the proposed amendments, and
- (c) all individuals who die on or after a certain date, that date being two years from the date the amendments come into force.

This would give testators two years to respond to the change in the law.

Conclusion

Tataryn already gives the surviving spouse the ability to seek division of matrimonial property under the umbrella of a family relief application, and wills are presently being drafted with this in mind. This is an awkward way of bringing about division of matrimonial property on death. Our recommendations would serve the same policy, but do it directly under the MPA, and deal with the consequential issues that arise in the administration of an estate faced with such a claim.

Final Report No. 84

Wills: Non-Compliance with Formalities

In this report we recommend that Alberta courts be given power to admit to probate a will or an alteration, revocation or revival of a will which does not comply with the formalities prescribed by the *Wills Act*. This power is generally referred to as a "dispensing power". The power could be exercised only if a court

is satisfied by clear and convincing evidence that the testator intended to adopt the document as a will, alteration, revocation or revival. In extreme cases, a court could even admit to probate a document which, for inadvertence or other good reason, a testator fails to sign. The only formal requirement that could not be dispensed with in a proper case would be writing. Electronic records could not be admitted to probate.

The *Wills Act* says that a will is not valid unless certain prescribed formalities are strictly complied with. A formal will is not valid unless the testator signs or acknowledges his or her signature in the presence of two witnesses who are present at the same time and who sign in the presence of the testator. A holograph will is not valid unless it is wholly in the handwriting of the testator, so that an unwitnessed will form, the blanks of which are filled in by a testator, is not valid unless the handwritten parts happen by chance to be enough to state testamentary intentions by themselves without reference to the printed words.

Testators sometimes fail to comply with these prescribed formalities because of ignorance or inadvertence. The number of such cases is small in comparison with the number of wills that comply with the formalities, but it is substantial in absolute terms. In the course of the shuffling of paper attendant on the execution of a will or a pair of wills, a witness, or even a testator, may fail to sign, or a husband and wife may inadvertently sign each other's wills. A testator who has already signed may fail to utter words of acknowledgment in the presence of both witnesses. A testator may be unable to raise his or her head to see the witnesses sign, so that the witnesses do not sign in the testator's "presence". The strict-compliance rule invalidates wills in such cases. The substance of the matter is that a testator has adopted a document as his or her will. That substance may be defeated because of a failure of form, that is, a failure to comply strictly with the statutory formalities.

The invalidation of wills because of failures to comply strictly with formalities has been seen in many places as unjust. Manitoba, Saskatchewan, Quebec, New Brunswick, and Prince Edward Island have given dispensing powers to their courts. So have five of the six Australian states (the sixth having adopted a

more restricted remedy). In the United States, the *Restatement of the Law Third* and the *Uniform Probate Code* contain provisions to much the same effect as dispensing powers, though differently worded, and several of the American states have adopted the *Uniform Probate Code* provision. Some of the Canadian and Australian dispensing powers have been in force for 20 or 25 years, apparently with beneficial results.

Strict compliance with the formalities helps to show that a will is an authentic expression of a testator's testamentary wishes. It is not, however, the only way in which authenticity can be shown. Attempted compliance may be just as good evidence as strict compliance. Other expressions of a testator's intention to adopt a document as a will may be equally valid. A requirement of "clear and convincing evidence" will give at least as much assurance that a testator intended to adopt a document as a will as does apparent strict compliance with the formalities.

This report recommends the enactment of a dispensing power provision because the existence of such a power will enable courts to give effect to testators' wishes in cases in which they must now refuse to do so. The requirement of clear and convincing evidence will prevent the admission to probate of dubious documents.

A dispensing power will not cure all cases. A testator may have intended to adopt a document as a will, but there may be no clear and convincing evidence that he or she did so. However, the requirement of clear and convincing evidence for the exercise of the dispensing power is necessary to ensure that only authentic wills are admitted to probate.

Testators will still have good reason to comply strictly with the formalities. A failure to comply strictly will expose a testator's estate to substantial additional legal costs. A failure to comply strictly will also increase the risk that a will will be rejected.

This report deals with one additional subject. Under the *Wills Act*, a will is invalidated by the subsequent marriage of the testator unless there is a declaration in the will that it is made in contemplation of that marriage. The requirement that the declaration be in the will is another formal requirement which is likely to defeat the wishes of a testator who intends a will to have effect despite the marriage or even makes the will because of the expectation of marriage. The report recommends that the *Wills Act* be amended to provide that a will is not revoked by marriage if there is clear and convincing evidence that the testator made it in contemplation of the marriage.

The Self-Regulation of the Legal Profession in Canada and in England and Wales*

Purpose of Book

[1] The legal profession in Canada and in England and Wales¹ is said to be "self-regulating" and to have powers of "self-regulation".² The notion is that the legal profession – that is, lawyers collectively – regulate the way in which lawyers practise law. The purpose of this book is to describe, in an historical context, the notion of self-regulation and its implementation in the two countries, and to assess its appropriateness for the present and the future.

The Content of Self-Regulation

What is Self-Regulation?

[2] At the threshold, it is necessary to consider what self-regulation denotes. As used in the context of the self-regulation of the legal professions in the two countries, it is not a precise term. Rather, it is imprecise to the point of vagueness.

¹ In England, barristers and solicitors are considered to belong to different professions, and the same is true of the advocates and the notaries in Quebec. I think, however, that it is conceptually better to treat the self-regulating profession and its branches in the two countries as one profession, and I will do so in this book, except where reference is made to one or more of the different professional groups.

² The term "self-governing" is often used instead of "self-regulating". I prefer the latter term: "self-governing" may carry the inappropriate connotation that the self-governing entity is somehow not subject to ordinary law.

[3] As a matter of English, "self-regulation", in this context, denotes a process under which an identifiable group of people "control, govern or direct" their own activities "by rules or regulations".³ That raises some general questions: (1) whose activities are regulated? (2) do the legal professions exercise the powers that are characterized as self-regulation? (3) what activities are regulated? (4) what is the extent of the powers of self-regulation?

The Bodies Which Exercise the Powers of Self-Regulation

[4] The legal profession is readily identifiable both in Canada and in England and Wales. In Canada, it consists of the members of the provincial and territorial law societies⁴, which are corporations created by statute in every province and territory. In England, the solicitors' branch of the profession consists of the persons whose names appear on the roll, or list, of solicitors maintained by the Law Society,⁵ and the barristers' branch consists of the members of the four Inns of Court, which are voluntary associations.

[5] The legal profession does not itself exercise the powers of self-regulation. In Canada, the benchers or councils of the Canadian law societies exercise the powers.⁶ In England and Wales, the Council of the Law Society exercises the powers of self-regulation of the solicitors' branch of the profession and the Bar Council and the Benchers of the Inns of Court exercise the powers of self-

³ See Oxford English Dictionary, 2nd edition: Self-regulation: "regulation, control or direction by or of oneself (itself)". Regulation: "the act of regulating, or the state of being regulated. Also an instance of this." Regulate: "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions...." In this context, "self-regulation" must mean that there are coterminous groups of regulators and regulated (the facts that some solicitors are not members of the Law Society and some barristers do not subscribe to the Bar Council being anomalous).

⁴ The Law Societies of Alberta, British Columbia, Manitoba, Newfoundland, New Brunswick, the Northwest Territories, Ontario, Prince Edward Island, Saskatchewan and Yukon; the Nova Scotia Barristers Society; and the Bar of Quebec and the Chamber of Notaries. The new territory of Nunavut was created after the text of this book was written, and the book does not deal with the legal profession in that territory.

⁵ See *Solicitors Act 1974 (U.K.)*, 1974, c. 47, s.6.

⁶ In some cases, the membership has some limited powers of control over the governing body. See Chapter II.

regulation of the barristers' branch. However, to the extent that those governing bodies are elected or otherwise named by the profession, it can appropriately be said that the profession is self-regulating even though the powers are not exercised by the whole bodies.

[6] In Canada, everyone who practises law is obliged by law to be a member of one of the statutory corporations, the governing bodies of which are mostly elected by the members who are entitled to practise, so that the regulators and the regulated are the same.⁷ Some members of the governing bodies are appointed by governments or outside agencies, but the elected members are in a majority and therefore can control the exercise of the self-regulatory powers. So the legal profession in Canada can appropriately be said to exercise the powers of self-regulation through its elected governing bodies.

[7] In England and Wales, solicitors need not be members of the Law Society. Those who are not members, though regulated by the Law Society, do not vote for members of the Law Society Council. Barristers must be members of one of the four Inns, but the benchers are named by the benchers themselves, and only those barristers who subscribe to the Bar Council are entitled to vote for members of the Council. Although the groups whose conduct is regulated are not coterminous with the groups who name the regulators, it is nevertheless still appropriate to say that the legal profession in England and Wales exercises the powers of self-regulation through its elected or self-selected governing bodies.

The Scope of Self-regulatory Powers

[8] The term "self-regulating" is also imprecise because it is used to describe governing bodies with widely varying powers. It is by no means clear what powers a professional body must have before it can be said to be "self-regulating".

⁷ The Benchers of the Law Society of Upper Canada were not elected until the enactment of *An Act to make the Members of the Law Society of Ontario elective by the Bar thereof*, S.O. 1871, c. 15 which provided that, except for the ex-officio Benchers, they were to be elected by the members of the Bar.

[9] If a legal professional body controls admission to the practice of law, including qualifications for admission; if it has the power to determine what standards of conduct and competence professionals must adhere to; and if it has the power to impose sanctions, including disbarment, for improper conduct or failure to provide competent service; then it can be said to be self-regulating. But something less will do. In Alberta, for example, the qualifications for admission to membership of the Law Society are prescribed by law, and the Law Society has little standing with respect to the educational component of the qualifications,⁸ but the Law Society of Alberta is regarded as having the power of self-regulation. In England, the Office for the Supervision of Solicitors operates with a significant degree of independence from the Law Society, and the Solicitors Disciplinary Tribunal, which has the power to strike solicitors' names from the register, is composed of solicitors and non-solicitors appointed by the Master of the Rolls, but the Law Society is regarded as having the power of self-regulation. There is no point in trying to decide what quantity of regulatory powers a professional body must have in order to be described as self-regulating. The term will be used in relation to the governing bodies of the legal profession in Canada and in England and Wales, and will take its precise meaning from the context in which it is used.

External Controls⁹

[10] The term "self-regulating" is also imprecise because it suggests that the professional governing bodies can exercise their powers of self regulation without interference. But this is not so. The courts have always had powers to act in the major areas of apparent professional self-regulation, whether through judicial review, visitation or appeal, or through direct control over counsel appearing before them and over solicitors as officers of the court. In some cases, other agencies have supervisory or veto powers. In England, for example, the *Access to Justice Act 1999* has given the Lord Chancellor an ultimate power of veto over changes in the rules of conduct and the admission regulations made by the Law Society and by the Inns and the Bar Council. It has gone further and given the Lord Chancellor power to make such rules and regulations. In some Canadian

⁸ *Legal Profession Act*, S.A. 1990, c.L-9.1, ss. 39,40.

⁹ See Chapter II for more complete descriptions of these external controls.

jurisdictions, regulations or bylaws require the approval of the Lieutenant Governor in Council. The English Legal Services Ombudsman and the Quebec L'Office des Professions have supervisory powers over some activities of the governing bodies. In Canada, even those professional governing bodies that have theoretical control over admission to practice and the qualifications for admission, although they may be able to exercise a veto in extreme cases, cannot effectively dictate the content of academic legal education.

The Duty to Exercise Self-regulatory Powers in the Public Interest

[11] In both Canada and England, there is also an overriding restriction on the exercise of the powers of self-regulation: they must be exercised in the public interest.

[12] Except for the Inns, the members of the profession elect most of the members of the governing bodies. In a sense, the elected members of the governing bodies are responsible to the members of the profession who elect them. But, in the exercise of delegated self-regulatory powers, that responsibility is superseded by a higher duty. The powers of self-regulation are only powers to regulate in the public interest.¹⁰ The members of the profession cannot dictate the way in which those whom they elect are to exercise the powers of self-regulation.

The Exclusive Right to Practise

[13] The self-regulatory powers of the legal professions in England and Canada depend on the exclusive, or nearly exclusive, rights of their members to render legal services in general, or specified legal services, and to use certain professional designations. The activities reserved for lawyers vary from jurisdiction to jurisdiction. In Canada, the most common provision is that only lawyers may engage in the practice of law, or the practice of a barrister and solicitor, sometimes with a list of specific included activities. In England and Wales, solicitors have the

¹⁰ The questions whether the powers of self-regulation are intended to be, and are in fact, exercised in the public interest are discussed in Chapter IV. Note that there may be an argument that the statements in the text do not apply to the Inns of Court, which do not depend on legislative delegation for their powers, though the argument is much weaker since the enactment of the *Court and Legal Services Act 1990*.

exclusive right to practise as solicitors of the Supreme Court and a right, shared with other groups, to engage in conveyancing, while barristers have a formerly exclusive right to act as advocates in the higher courts, which is now shared with some solicitors, and, in some types of proceedings, with some members of the Institute of Legal Executives.

[14] Effectively, anyone who proposes to act as a lawyer must become a member of a self-regulatory professional body (or, in the case of an English solicitor, must obtain enrolment on the Solicitors' Roll by a self-regulatory body). Self-regulatory powers over qualifications and admission to practice can thus be enforced against entrants to the profession. Once admitted, the lawyer must continue to be a member of the self-regulatory body (or must continue to be registered on the Solicitors' Roll). Self-regulatory powers over conduct and competence can be enforced against the lawyer because the lawyer must continue to be registered or enrolled by the professional body in order to practise.

[15] The system of self-regulation thus has two sides. The powers of self-regulation are one side. The rights to render services which are largely reserved to lawyers, and to use professional designations, are the other side.

Ends and Means of Self-regulation

[16] Chapter V of this paper discusses the purposes of the self-regulation of the legal profession. It tries to demonstrate that the ultimate purpose of self-regulation is the protection of clients and society, and that the more immediate goal of self-regulation is to do whatever is practicable to ensure that, within limits prescribed by law, legal ethics and the public interest, lawyers will serve clients competently, faithfully and confidentially.¹¹ To the extent that this immediate goal is achieved or approximated, clients and society are protected.

¹¹ These words seem to me to epitomize the lawyer's duty. They are a free adaptation from Law Commissioner Whitelock's address to the new sergeants in 1648 as quoted at Cranston 1995, 6, the Commissioner's actual words being "secrecy, diligence and fidelity". "Diligence", in his view, included what I regard as "competence".

[17] Chapter III describes in greater detail devices of self-regulation employed by the governing bodies of the professions. One group of devices is designed, in a positive way, to promote the competence and ethical motivation of those who provide legal services. A second group of devices is designed to police and penalize failures of competence and ethical conduct. A third group of devices partakes of both aspiration and policing. A fourth is a group of devices for the compensation of clients for serious departures from standards of ethical conduct and competence of service. Although not all of these devices are employed by every law society, and although the use of them is often subject to control by the courts or by organisms of government, I submit that they collectively constitute systems of self-regulation.

Plan of Book

[18] The plan of this book is as follows:

1. Chapter II describes the structure of the Law Society and Bar of England and Wales and the Canadian law societies (all of which are collectively included for the purposes of this book in the term "law societies") and gives an historical account of the acquisition of their self-regulatory powers and of the restrictions placed on those powers from time to time.
2. Chapter III describes the regulatory devices adopted by the law societies and argues that, taken collectively, those devices amount to regulatory systems designed to ensure, as far as practicable, that legal services will be delivered competently, faithfully and confidentially.
3. Chapter IV examines the notion of professionalism, which animates self-regulation, and argues that there exists in the legal profession a spirit of professionalism which recognizes that professionals are driven by factors which drive other people but which also recognizes that professionals owe overriding duties to those whom they serve.
4. Chapter V

- (a) develops the theme that self-regulatory powers are delegated to and received by the governing institutions of the legal professions in what is perceived to be the public interest;
- (b) identifies the public interest involved;
- (c) identifies "professionalism" and a "social contract" as the basis of the self-regulation of the legal professions; and
- (d) addresses the question whether or not self-regulation is in fact in the public interest.

5. Chapter VI discusses the future of self-regulation.

[19] There is one Appendix. It is a discussion of the meaning of "competence" and its relation to other notions such as that of "diligence", concepts which are necessary to an understanding of self-regulation but are better examined separately so as not to disrupt the discussion.



ADMINISTRATIVE PROCEDURES

Final Report No. 79 was issued in December 1999. Draft legislation was attached. The report contains an Annotated Model Code from which tribunals may draw the necessary powers and procedures.

CASE MANAGEMENT

The Alberta Law Reform Institute prepared the original Case Management Practice Note (No. 3) which was put in place as a Court of Queen's Bench Practice Note. The Institute worked in conjunction with a Civil Practice Steering Committee of lawyers and judges.

Practice Note No. 4 (Case Management of Very Long Trials) was produced by a Court of Queen's Bench Committee which drafted the rules, and consulted with the profession on a set of rules specific to very long trials.

The notes are now under review with a view to: amending in the light of the experience under the rules in the last five years; combining the case management rules for very long and other trials; moving the practice notes into the body of the rules.

The Alberta Law Reform Institute has provided assistance in the early drafting and in review of the versions circulated to the profession. The review is being conducted by a Task Force chaired by Justice Burrows under the auspices of the Queen's Bench Civil Practice and Procedure Committee.

CASEFLOW MANAGEMENT

The Alberta Law Reform Institute commenced its work on Caseflow Management as a result of various initiatives related to the time and cost of litigation raised at a meeting of judges, lawyers, and Court Services personnel.

As a result of this meeting, a Design Group was created to produce proposals for the implementation of a Caseflow Management system in Alberta. The Institute completed its work for the Design Group and produced draft operating procedures for the implementation of a three-stream Caseflow Management system in Alberta. However, the anticipated implementation dates were initially postponed and subsequently suspended, pending a decision on the infrastructure and computer support systems necessary to support a Caseflow Management system.

The project is on hold until such decisions are made.

CLASS ACTIONS

We formally adopted a Project on Class Actions in July 1999. We did so after having gauged interest in law reform by distributing a questionnaire to, and receiving responses from, various persons whom we knew to have special knowledge, experience or awareness of the issues in this area of the law.

In the Class Actions Project, we have examined the existing law and procedures that govern proceedings in which a number of plaintiffs have the same or similar claims against a defendant and assessed the problems in the operation of the law. Ancillary to this, we are examining the operation of the existing law where a number of defendants are in the same or a similar position in relation to claims brought against them.

In March 2000, we issued Consultation Memorandum No. 9 on Class Actions in which we asked two major questions:

- Is Alberta's current class actions procedure in need of reform?
- If it is, what should the nature of that reform be? Here, we raised 16 specific issues.

We also provided as an appendix, the annotated model act produced by the Uniform Law Conference of Canada, along with additional notes pointing out the major variations among Canadian jurisdictions that have enacted, or recommended, modern class actions statutes. We requested comments in response by the end of May.

With this information in hand, we are now considering whether it is necessary, or possible, to provide a more satisfactory procedural framework in which to meet the multiple plaintiff litigation demands of modern Alberta. If and as appropriate, we will make recommendations for improvements that are intended to alleviate the problems identified. Our target is to issue our report during the current year.

COST OF CREDIT

Final Report No. 82 was issued in February 2000. The report provides an historical description of the harmonization process through which model credit disclosure legislation was developed. It also highlights issues where the model legislation might be improved, and summarises the differences between the *Fair Trading Act of Alberta* and the model template.

DISCOUNT RATES

The Institute has prepared background research on the methods by which discount rates for the current value of future payments may be determined. If there is a further request for the implementation of such a proposal, the research will be updated and recommendations developed.

DIVISION OF MATRIMONIAL PROPERTY ON DEATH

In June 200 the Institute released Report No. 83, *Division of Matrimonial Property on Death*. This report reflects the views that a surviving spouse whose marriage ends on the death of his or her spouse, should have the same matrimonial property rights as a spouse whose marriage ends by reason of marriage breakdown. The balance of the report deals with the issues that must be addressed in order to implement this policy.

FAMILY LAW

A set of Reports for Discussion No. 18.1, 18.2, 18.3 and 18.4 was issued in late 1998 and has been the focus of discussion by a Departmental Working Group. The Alberta Law Reform Institute has provided further comment to that group. We expect to return to this topic in early 2001.

OCCUPIERS' LIABILITY

Final Report No. 81 was issued in February 2000. The Minister of Justice requested a report regarding the liability of occupiers of land to recreational users permitted on their premises without payment of a fee. If a decision is made to change the responsibilities of owners and users, the report suggests matters that should be taken into account in making that threshold decision.

PRUDENT INVESTOR RULE (TRUSTEE INVESTMENTS)

Final Report No. 80 was issued in February 2000. The powers and duties of a trustee with respect to the investment of trust property are governed by the instrument that created the trust. If, however, the trust instrument does not expressly define the scope of the trustee's investment powers, it is defined by section 5 of the *Trustee Act*.

Section 5 is an example of what has come to be known as the *legal list* approach to the statutory definition of trustee investment powers. Under this approach, a trustee may invest trust funds only in types of property (usually securities of one sort or another) identified in the statute, unless the trust instrument provides broader investment powers. The purpose of restricting trustees to investing in the specified types of property is to prevent them from exposing the trust capital to undue risk. The legal list approach developed in the United Kingdom in the nineteenth century. Until the last twenty years or so, trustee statutes in the United Kingdom, Canada, Australia and New Zealand all followed some version of the legal list approach.

The prudent investor approach is an elaboration of an approach called the *prudent man* rule that has long been followed by most jurisdictions in the United States. New Zealand adopted the prudent investor rule in 1988, and all Australian states have now done likewise. It appears that the United Kingdom will soon replace its version of the legal list approach with the prudent investor rule. Alberta is one of four Canadian provinces—the others being British Columbia, Quebec and Newfoundland—that have not yet adopted either the prudent man rule or the prudent investor rule.

The central recommendation of this report is that Alberta should follow the trend of legislation in other jurisdictions and replace the legal list approach with the prudent investor rule. We make this recommendation not to follow a trend but because we believe that the jurisdictions that have adopted the prudent investor rule have acted on the basis of sound theoretical and practical considerations. Legislation to implement the prudent investor rule in Alberta would take advantage of the Uniform Law Conference of Canada's *Uniform Trustee Investment Act, 1997*.

SUCCESSION CODE

The succession law of Alberta is scattered among 66 different pieces of legislation. Much of it is in need of review and modernization. The Institute is in the process

of determining the size and scope of this project and will work towards consolidating the key components of this area of law.

UNIFORM ENFORCEMENT OF JUDGMENTS ACT & COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT

This project will be resumed when the Uniform Law Conference of Canada completes its work on enforcement of foreign judgments, expected in fall 2001. Then, a package dealing with court jurisdiction, enforcement of Canadian and foreign judgments will be prepared.

WILLS: NON-COMPLIANCE WITH FORMALITIES

Final Report No. 84 was published in June 2000. This report recommends that Alberta courts be given power to admit to probate a will or an alteration, revocation or revival of a will which does not comply with the formalities prescribed by the *Wills Act*. This power is generally referred to as a "dispensing power". The power could be exercised only if a court is satisfied by clear and convincing evidence that the testator intended to adopt the document as a will, alteration, revocation or revival. In extreme cases, a court could even admit to probate a document which, for inadvertence or other good reason, a testator fails to sign. The only formal requirement that could not be dispensed with in a proper case would be writing. Electronic records could not be admitted to probate.



FINAL REPORT

ENACTMENT

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|---|--|
| 1* Compensation for Victims of Crime (1968) | Criminal Injuries Compensation Act, R.S.A. 1970, c. 75 (now R.S.A. 1980, c. C-33, am. by S.A. 1982, c. 14). |
| 2* Powers of Personal Representatives to Grant Options (June 1969) | Wills Act, R.S.A. 1970, c. 393, s. 30 (now R.S.A. 1980, c. W-11, s. 30).
Devolution of Real Property Act, R.S.A. 1970, c. 109, s. 13 (now R.S.A. 1980, c. D-34, s. 12). |
| 3* Occupiers' Liability (December 1969) | Occupiers' Liability Act, S.A. 1973, c. 79 (now R.S.A. 1980, c. O-3). |
| 4* Age of Majority (January 1970) | Age of Majority Act, S.A. 1971, c. 1 (now R.S.A. 1980, c. A-4). |
| 5* Guarantees Acknowledgment Act, R.S.A. 1970, c. 173 (October 1970) | Principal recommendation for retention of Guarantees Acknowledgment Act (now R.S.A. 1980, c. G-12) accepted. Recommendations for incidental amendments not acted upon. |
| 6* Rule Against Perpetuities (August 1971) | Perpetuities Act, S.A. 1972, c. 131 (now R.S.A. 1980, c. P-4). |
| 7* Joinder of Divorce Proceedings with other Causes of Action (August 1971) | Alberta Rules of Court, Rule 563(3), Alta. Reg. 315/71. |
| 8* Assignment of Wages (October 1971) | Wage Assignments Act, S.A. 1972, c. 61 (now R.S.A. 1980, c. W-1). |
| 9* Rule in <i>Saunders v. Vautier</i> (February 1972) | S.A. 1973, c. 13, s. 12 amending the Trustee Act, R.S.A. 1970, c. 373, s. 37 (now R.S.A. 1980, c. T-10, s. 42). |
| 10* Powers of Maintenance and Advancement (June 1972) | S.A. 1974, c. 65, s. 9 amending the Trustee Act, R.S.A. 1970, c. 373, ss. 31-33 (now R.S.A. 1980, c. T-10, ss. 32, 34, 35, 36(3), 37). |

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- 11* Common Promisor and Promisee:
Conveyances with a Common Party
(October 1972)
- 12* Expropriation (March 1973)
- 13* Judicature Act, Section 24 (August
1974)
- 14 Minors' Contracts (January 1975)
- 15* Validity of Rules of Court
(December 1974)
- 16* Rule in *Hollington v. Hewthorn*
(February 1975)
- 17* Small Projects
(June 1975)
- 18* Matrimonial Property
(August 1975)
- 19* Consent of Minors to Health Care
(December 1975)
- 20 Status of Children (June 1976)

ENACTMENT

Common Parties Contracts and
Conveyances Act, S.A. 1974, c. 20
amended 1975, c. 5 (2 sess.) (now Law of
Property Act, R.S.A. 1980, c. L-8, ss. 10-
13; Land Titles Act, R.S.A. 1980, c. L-5,
ss. 71, 72, 119).

Expropriation Act, S.A. 1974, c. 27 (now
R.S.A. 1980, c. E-16).

S.A. 1974, c. 65, s. 9 striking out s. 24 of
the Judicature Act, R.S.A. 1970, c. 193.

S.A. 1976, c. 58, s. 6(4) amending the
Judicature Act, R.S.A. 1970, c. 193, s. 39
(now R.S.A. 1980, c. J-1, s. 47).

S.A. 1976, c. 57, s. 1 amending the
Alberta Evidence Act, R.S.A. 1970,
c. 127, s. 27 (now R.S.A. 1980, c. A-21,
s. 27).

S.A. 1976, c. 55, s. 2 amending the
Workers' Compensation Act, S.A. 1973,
c. 87, s. 15 (now R.S.A. 1980, c. W-15,
s. 15); S.A. 1976, c. 58, s. 3 amending
the Bulk Sales Act, R.S.A. 1970, c. 37
(now R.S.A. 1980, c. B-13, ss. 1(f), (j),
4(2), 6(b), 7, 14).

Matrimonial Property Act, S.A. 1978,
c. 22 (now R.S.A. 1980, c. M-9),
enacting a combination of the majority
and minority proposals for the
distribution of matrimonial property, and
an extension of the recommendations on
possession of the matrimonial home.

Substantially enacted, pursuant to the
recommendations in Report 60 by the
Family and Domestic Relations Statutes
Amendment Act, 1991, S.A. 1991, c. 11.

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- 21* Purchase by a Company of Shares
Which It Has Issued (January 1977)

- 22* Residential Tenancies
(February 1977)

- 23* Partition and Sale (March 1977)

- 24 Survival of Actions and Fatal
Accidents Act Amendment
(April 1977)

- 25 Family Law Administration: the
Unified Family Court (April 1978)

- 26 Family Law Administration: Court
Services (April 1978)

ENACTMENT

S.A. 1977, c. 13, s. 2 amending the Companies Act, R.S.A. 1970, c. 60, s. 41 (reenacted as R.S.A. 1980, c. C-20, ss. 42-49, 51-54, then superseded by S.A. 1981, c. B-15, ss. 32 and 33: see Report 36).

Landlord and Tenant Act, 1979, S.A. 1979, c. 17 (now R.S.A. 1980, c. L-6), based in large part on our recommendations.

Partition and Sale Act, S.A. 1979, c. 59 (now Law of Property Act, R.S.A. 1980, c. L-8, ss. 14-19, 20-34).

Survival of Actions Act, S.A. 1978, c. 35 (now R.S.A. 1980, c. S-30; Fatal Accidents Act R.S.A. 1980, c. F-5, ss. 5(2)(a), (b), 8; and Limitation of Actions Act, R.S.A. 1980, c. L-5, s. 53).

Some recommendations carried out by administrative action.

FINAL REPORT

- 27 Matrimonial Support
(March 1978)
- 28 Tenancies of Mobile Home Sites
(April 1978)
- 29 Family Relief (June 1978)
- 30* The Builders' Lien Act: Certain
Specific Problems (March 1979)
- 31 Contributory Negligence and
Concurrent Wrongoers
(April 1979)
- 32 Guest Passenger Legislation (April
1979)
- 33 Inter-Spousal Tort Immunity (April
1979)

ENACTMENT

S.A. 1977, c. 64 amending Part 4 of the Domestic Relations Act, R.S.A. 1970, c. 113 (now covered by the Maintenance Enforcement Act, S.A. 1985, c. M-0.5, establishing a collection service for support orders which is generally consistent with though different in detail from our recommendations, and providing improved collection procedures which are similar to but in several particulars more stringent than our proposals); S.A. 1977, c. 92 amending the Social Development Act, R.S.A. 1970, c. 345 (now R.S.A. 1980, c. S-16, ss. 14, 15); S.A. 1978, c. 49, s. 2 amending the Debtors' Assistance Act, R.S.A. 1970, c. 86 (now R.S.A. 1980, c. D-5, ss. 3(2), 3(3), 4(e)-(f), (6). (Our proposals for change in the substantive law have not yet been implemented.)

Mobile Home Sites Tenancies Act, S.A. 1982, c. M-18.5.

S.A. 1985, c. 14 amending the Builders' Lien Act, R.S.A. 1980, c. B-12.

Proclamation 5 July 1979 of previously enacted S.A. 1977, c. 76, s. 6 to come into force 1 September 1979 (now Insurance Act, R.S.A. 1980, c. I-5, s. 310) (This is not the principal recommendation of the Report.)
Gratuitous Passengers and Interspousal Tort Immunity Statutes Amendment Act (S.A. 1990, c. 22, s. 1).

Gratuitous Passengers and Interspousal Tort Immunity Statutes Amendment Act (S.A. 1990, c. 22, ss. 2 and 3).

FINAL REPORT**ENACTMENT**

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| 34 | Service of Documents During Postal Interruptions (June 1979) | S.A. 1980, c. 88 (now Judicature Act, R.S.A. 1980, c. J-1, ss. 33-37). |
| 35* | Defamation: Fair Comment and Letters to the Editor (October 1979) | S.A. 1980, c. 11 amending the Defamation Act, R.S.A. 1970, c. 87 (now R.S.A. 1980, c. D-6, s. 9). |
| 36* | Proposals for a New Alberta Business Corporations Act (August 1980), 2 vols. | Business Corporations Act, S.A. 1981, c. B-15. |
| 37A | The Uniform Evidence Act 1981: A Basis for Uniform Evidence Legislation (June 1982) | |
| 37B | Evidence and Related Subjects: Specific Proposals for Alberta Legislation (June 1982) | |
| 38 | The Uniform Sale of Goods Act (October 1982) | |
| 39 | Defences to Provincial Charges (March 1984) | |
| 40 | Judicial Review of Administrative Action: Application for Judicial Review (March 1984) | Court of Queen's Bench Amendment Act, 1987, S.A. 1987, c. 17. |
| 41 | Compensation for Security Interests in Expropriated Land (May 1984) | |
| 42 | Debt Collection Practices (June 1984) | See generally, Civil Enforcement Act, S.A. 1994, c. C-10.5. |
| 43 | Protection of Children's Interests in Custody Disputes (October 1984) | |
| 44 | Statute of Frauds (June 1985) | |
| 45* | Status of Children: Revised Report, 1985 (November 1985) | Substantially enacted, pursuant to the recommendations in Report 60 by the Family and Domestic Relations Statutes Amendment Act, 1991, S.A. 1991, c. 11. |

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| 46* | Trade Secrets (July 1986) | Draft statute adopted by Uniform Law Conference of Canada, Victoria, B.C., August 1987. |
| 47 | Survivorship (August 1986) | |
| 48 | Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown (June 1986) | |
| 49 | Proposals for a New Alberta Incorporated Associations Act (March 1987) | Bill 54 (Volunteer Incorporations Act) introduced into Alberta Legislature, June 15, 1987. |
| 50 | Prejudgment Remedies for Unsecured Claimants (February 1988) | Civil Enforcement Act, S.A. 1994, c. C-10.5. |
| 51 | Proposals for a New Alberta Arbitration Act (October 1988) | Arbitration Act, S.A. 1991, c. A-43.1. |
| 52 | Competence and Human Reproduction (February 1989) | |
| 53 | Towards Reform of the Law Relating to Cohabitation Outside Marriage (June 1989) | |
| 54 | Financial Assistance by a Corporation: Section 42, The Business Corporations Act (Alberta) (August 1989) | Business Corporations Act, S.A. 2000, c. 10, s. 2, Proc. |
| 55 | Limitations (December 1989) | Limitations Act, S.A. 1996, c. L-15.1. In Force March 1, 1999 |
| 56 | The Bulk Sales Act (January 1990) | Miscellaneous Statutes Amendment Act, 1992, S.A. 1992, c. 21, s. 5. |
| 57 | Section 16 of the Matrimonial Property Act (March 1990) | Miscellaneous Statutes Amendment Act, 1991, S.A. 1991, c. 21, s. 24. |
| 58 | Division of Canada Pension Plan Credits in Alberta (November 1990) | |

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| 59 | Enduring Powers of Attorney
(December 1990) | Powers of Attorney Act, S.A. 1991
c. P-13.5. |
| 60 | Status of Children: Revised Report,
1991
(March 1991) | Family and Domestic Relations Statutes
Amendment Act, 1991, S.A. 1991, c. 11. |
| 61 | Enforcement of Money Judgments,
2 Vols., (March 1991) | Civil Enforcement Act, S.A. 1994,
c. C-10.5. |
| 62 | Proposals for the Reform of the
Public Inquiries Act
(November 1992) | |
| 63 | Section 195 of the Land Titles Act
(February 1993) | Miscellaneous Statutes Amendment Act,
1994, S.A. 1994, c.23, s.26. |
| 64 | Advance Directives and Substitute
Decision—Making in Personal
Health Care
(March 1993)
<i>(A Joint Report of the Alberta Law
Reform Institute and the Health Law
Institute)</i> | Personal Directives Act, S.A. 1996, c. P-
4.03.
Proclamation December 1, 1997
O/C #5319 |
| 65 | The Domestic Relations Act (DRA)
— Phase 1. Family Relationships:
Obsolete Actions (March 1993) | |
| 66 | Non-Pecuniary Damages in
Wrongful Death Actions—A
Review of Section 8 of the Fatal
Accidents Act (May 1993) | Fatal Accidents Amendment Act, 1994,
S.A. 1994, c.16; Alta. Reg. 20/2000. |
| 67 | Transfers of Investment Securities
(June 1993) | |
| 68 | Beneficiary Designations: RRSPs,
RRIFs and Section 47 of the Trustee
Act (September 1993) | Miscellaneous Statutes Act, 1994, S.A.
1994, s. 46. |
| 69 | Proposals for a Land Recording and
Registration Act for Alberta, 2
Vols., (October 1993) | Principles adopted in the Metis
Settlements Land Registry Regulation
(AR 361/91) |
| 70 | Mortgage Remedies in Alberta
(June 1994) | |

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|----|---|--|
| 71 | The Presumption of Crown Immunity (July 1994) | |
| 72 | Effect of Divorce on Wills (November 1994) | |
| 73 | Revision of the Surrogate Rules (Final Report) (May 1996) | The principal statutory amendments of Report for Discussion 10 anticipating the new rules were enacted in the Miscellaneous Statutes Amendment Act, 1992, c. 21, s. 47. The Rules and Forms were enacted by OC 32/95 on June 19, 1995. |
| 74 | Protection Against Domestic Abuse (February 1997) | Protection Against Family Violence Act, S.A. 1998, c. P-19.2. |
| 75 | "Last Clear Chance" Rule (August 1997) | Bill 20, Justice Statutes Amendment Act 2000. |
| 76 | Should a Claim for the Loss of a Chance of Future Earnings Survive Death? (December 1998) | Bill 20, Justice Statutes Amendment Act 2000. |
| 77 | Limited Liability Partnerships (April 1999) | Partnership Act R.S.A. 1980, c. P-2, as am. by S.A. 1999, c. 27. |
| 78 | Reform of the Intestate Succession Act (June 1999) | |
| 79 | Powers and Procedures for Administrative Tribunals in Alberta (December 1999) | |
| 80 | Trustee Investment Powers (February 2000) | |
| 81 | Occupiers' Liability: Recreational Use of Land (February 2000) | |
| 82 | Cost of Credit Disclosure (February 2000) | Fair Trading Act, S.A. 1998, c. F-1.05 |
| 83 | Division of Matrimonial Property on Death (May 2000) | |
| 84 | Wills: Non-Compliance with Formalities (June 2000) | |

REPORTS FOR DISCUSSION**NOTE**

- 1* Protection of Trade Secrets
(February 1984)
- 2* Matrimonial Property: Division of
Pension Benefits upon Marriage
Breakdown (May 1985)
- 3* Remedies of Unsecured Creditors
(May 1986)
- 4 Limitations
(September 1986)
- 5 Financial Assistance by a
Corporation: Section 42, The
Business Corporations Act (Alberta)
(August 1987)
- 6 Sterilization Decisions: Minors and
Mentally Incompetent Adults
(March 1988)
- 7 Enduring Powers of Attorney
(February 1990)
- 8 Towards a New Alberta Land Titles
Act (August 1990)
- 9 Mortgage Remedies in Alberta
(April 1991)
- 10 Revision of the Surrogate Rules
(October 1991)
- 11* Advance Directives and Substitute
Decision—Making in Personal
Health Care
(November 1991)
- 12 Non-Pecuniary Damages in
Wrongful Death Actions — A
Review of Section 8 of the Fatal
Accidents Act (June 1992)
- 13 Report on Liens
(September 1992)

REPORTS FOR DISCUSSION**NOTE**

- 14 The Matrimonial Home
(March 1995)
- 15* Domestic Abuse: Toward an
Effective Legal Response
(June 1995)
- 16 Reform of the Intestate Succession
Act (January 1996)
- 17 Division of Matrimonial Property
on Death (March 1998)
- 18 Family Law (October 1998)
 - 18.1 Overview
 - 18.2 Spousal Support
 - 18.3 Child Support
 - 18.4 Child Guardianship, Custody
and Access

ISSUES PAPERS

NOTE

- 1 Towards a New Arbitration Act for Alberta (July 1987)
- 2 Towards Reform of the Law Relating to Cohabitation Outside Marriage (October 1987)
- 3 Public Inquiries (November 1991)
- 4 Limited Liability Partnerships and Other Hybrid Business Entities (March 1998)

DISCUSSION PAPERS

NOTE

- 1 Civil Litigation: The Judicial Mini-Trial (August 1993)

RESEARCH PAPERS

NOTE

- 1* Rent Control; Security of Tenures
(November 1975)
- 2* Entry of Landlord; Locks and
Security Devices (November 1975)
- 3* Obligation to Repair; Security
Deposits (November 1975)
- 4* Termination Procedures; Failure of
Tenants to Pay Rent; Overholding
Tenants
(November 1975)
- 6* Resolution of Disputes; Landlord
and Tenant (Advisory) Boards;
Distress (November 1975)
- 7* Contract or Property Law; Form and
Delivery of Lease; Right to Assign
or Sublet (November 1975)
- 8* Mobile Homes
(November 1975)
- 9* Consent of Minors to Medical
Treatment (May 1975)
- 10 Illegitimacy
(June 1974)
- 11* Administration of Family Law: The
Unified Family Court:
Constitutional Opinions
(May 1978)
- 12* Statute of Frauds
(March 1979)
- 13 Matrimonial Support Failures:
Reasons, Profiles and Perceptions of
Individuals Involved (Canadian
Institute for Research in the
Behavioural and Social Sciences:
March 1981)

RESEARCH PAPERS

NOTE

- 14 Conference Materials, International
Invitational Conference on
Matrimonial and Child Support, 27-
30 May 1981 (October 1982)
- 15 Survey of Adult Living
Arrangements: A Technical Report
(November 1984)
- 16 The Operation of the Unsecured
Creditors' Remedies System in
Alberta (March 1986)
- 17* Corporate Directors' Liability
(February 1989)
- 18 Report on Referees
(February 1990)
- 19 Dispute Resolution: A Directory of
Methods, Projects and Resources
(July 1990)
- 20 Court-Connected Family Mediation
Programs in Canada (May 1994)

The principal recommendation of
Research Paper 18 was implemented by
Alta. Reg. 308/91.

CONSULTATION MEMORANDA

- 1 Division Of Pension Benefits Upon
Marriage Breakdown
(September 1995)
- 2 Reasonable Accommodation In The
Workplace (November 1995)
- 3 Business Names Legislation
(December 1996)
- 4 Should a Claim for Loss of Chance
of Future Earnings Survive Death?
(August 1997)
- 5 Should a Claim for Punitive
Damages Survive Death?
(December 1998)
- 6 Powers and Procedures for
Administrative Agencies: Model
Code (April 1999)
- 7 Trustee Investment Powers
(September 1999)
- 8 Wills: Non-Compliance with
Formalities (December 1999)
- 9 Class Actions
(March 2000)

PRACTICE MANUALS

Alberta Surrogate Forms

- Integration of rules and forms
- Comprehensive collection of forms
- Computer templates including completion instructions
- User notes

Arbitration Clauses Guide

- Checklists of procedural rules under the Act
- Discussion of sample clauses and agreements
- Complete set of procedural rules ready for adoption

OTHER PUBLICATIONS

Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada (A report by the Joint Land Titles Committee — Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, N.W.T., Ontario, Saskatchewan and Yukon) (July 1990)

Final Revisions. Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada. (A report by the Joint Land Titles Committee — Alberta, British Columbia, Manitoba, N.W.T., Ontario, Saskatchewan and Yukon) (March 1993)

The Self-Regulation of the Legal Profession in Canada and in England and Wales by W.H. Hurlburt. Co-published by: The Law Society of Alberta and the Alberta Law Reform Institute. (January 2000)